No. 83 5108

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ALEXANDER FEINBERG,

Petitioner,

-v-

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HARRY C. BATCHELDER, JR.
CAROL PRENDERGAST
90 Broad Street
New York, N.Y. 10004
(212) 344-8880

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the methods employed by Government agents in the course of their involvement with Petitioner were outrageous and overreaching, constituting a violation of Petitioner's Due Process rights?

2. Whether a defendant's predisposition can be proven by the introduction of non-criminal acts or by virtue of the defendant's response to the Government's suggesstion of crime, following months of enticement by the Government?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No.

ALEXANDER FEINBERG,

Petitioner,

-v-

UNITED STATES OF AMERICA,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Alexander Feinberg prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, which affirmed the judgment of conviction of the United States District Court for the Eastern District of New York sentencing him to a term of imprisonment of three (3) years and a fine of forty thousand dollars. Following a jury trial, Petitioner was convicted of violation of 18 U.S.C. §371, §201, §203, §201(g), §203(a), and 1952.

OPINIONS BELOW

The opinion of the Court of Appeals dated April 5, 1983, affirming the conviction of Petitioner is annexed as Appendix A. The Order of the Court of Appeals, dated May 24, 1983, denying Petitioner Williams' Petitioner for a Rehearing En Banc is annexed as Appendix B.

JURISDICTION

The jurisdiction of the Supreme Court to review the Final Judgment of the Court of Appeals for the Second Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF FACTS

A. Introduction

When the Abscam investigation began, Alexander Feinberg was a respected, seventy-two year old attorney with a small general practice in Cherry Hill, New Jersey. (T-3197-99, 3207-12, 3294-95, 3389-91)[1/]. Chief Prosecutor Thomas Puccio confirmed the fact that prior to the investigation, there was not one scintilla of evidence, or indeed even an allegation, that Mr. Feinberg had ever been engaged in illegal activity. (T-661, DP-413, 778). Following his service in the Navy during World War II, Mr. Feinberg established a private legal practice. In 1951, he became an Assistant United States Attorney for the State of New Jersey. He continued in that position until early 1953. (T-3547). In the late 1960's he was appointed by President Johnson to the Commission on Urban Problems. (T-3548).

Pursuing an interest in Democratic politics, he ran for Congress in 1958. (T-3549). In the course of this campaign, he met and befriended Senator Williams (T-3751, 4164-68). Although Mr. Feinberg was unsuccessful in his bid for Congress, his friendship with the Senator endured. (T-3751, 3785).

[1/] Citations to the record will be as follows: Testimony in the trial - "T"; Exhibits in the trial - "Ex."; Government Exhibits - "G.Ex."; Feinberg Exhibi "F.Ex."; Williams Exhibits - "W.Ex."; and testimony in the Williams/Feinberg Due Process hearings - "DP".

Before the F.B.I. entered Mr. Feinberg's life, he had an interest, together with a partner, in a small water company in New Jersey. Additionally, through his legal practice, he became aware that the Ritz Carlton Casino, as well as the Garden State Raceway were in need of financing. (T-3563-65, 3595-96, 3679, 3685-88). None of these ventures were illegitimate in any way. Yet, all became fruitful sources of innuendos in the prosecution's case against Mr. Feinberg.

B. Biocel

During a meeting with Senator Williams in the early 1970's Mr. Feinberg met Henry A. Williams, III, (hereinafter referred to as Sandy Williams). (T-3549-50). Their business relationship commenced with a garbage recycling project known as Biocel. (T-1549-50).

The original corporation, created to put to use the expertise of its founder, Ronald Penque, was Penque Williams, Inc. (T-1549-51, 2875-77). Despite the fact that Biocel never produced any revenues, Biocel of New Jersey, Biocel of Sussex and Biocel of Essex were formed to utilize local garbage recycling opportunities. (T-4181-86). Each of these projects proved to be a financial and political disaster. (T-3555, 3568-69, 3583, 3834-35, 3946).

Mr. Feinberg had no financial interest in Biocel. However, at the request of Sandy Williams, he incorporated Biocel of New Jersey and Biocel of Sussex, and issued shares of stock in the latter to the wives of Mr. Feinberg,

Sandy Williams and Senator Williams. (T-1551-52, 2893, 3550-53, 3753-54). Mr. Feinberg also represented Biocel before various regulatory bodies, in an effort to obtain necessary permits. (T-2894-96, 2909, 3553-54). All of these proceedings were public; all stock interests were disclosed. (T-3554). According to Penque, Biocel was defeated by local political pressure. (T-2902, 3041).

Mr. Feinberg after encountering severe problems with one permit application, sought a meeting with the appropriate state commissioner. (T-3557). Unable to reach then Commissioner Bardin, Mr. Feinberg asked Senator Williams to arrange a meeting. (T-3557). Mr. Feinberg subsequently met the Commissioner, but the permit was not reinstated. Commissioner Bardin emphatically denied that either the Senator or anyone else had exerted political pressure on the Commission. (T-3403-04, 3557, 3588). Both Penque and Mr. Feinberg denied using improper political influence in attempting to obtain permits. (T-2901-03, 2910-11).

Mr. Feinberg also prepared an application for Biocel to participate in certain dumping activities. (T-3558). Although Penque's recycling process had been given favorable technical approval by several reputable institutions, it was shunted aside in favor of a competitor. (T-3558). Convinced that Biocel's loss was the result of improper influence, Sandy Williams decided to "appeal" to the Governor. When his efforts to make an appointment with Governor Byrne failed, he contacted Senator Williams. Sandy Williams and Mr. Feinberg were

subsequently granted a meeting with Charles Corrella, a member of Governor Byrne's staff. (T-1555-56). Corrella indicated only that he would relay Sandy Williams' allegations of improper influences to the Governor. (T-3559). During the Corrella meeting, in which Mr. Feinberg said nothing, Sandy Williams never asked for any favorable consideration for Biocel and none was forthcoming (T-1947-53, 2016, 3559).

In the senatorial campaign of 1976, Senator Williams suffered considerable political embarrassment as a result of his involvement in Biocel. His opponents leveled accusations that he had used undue influence in the application for dumping permits in the Meadowlands. These allegations were denied by the Senator and unsubstantiated by his opponents. Nevertheless, the Senator and his supporters regretted his involvement in the project. (T-3555, 3568-69, 3583, 3834-35, 3946).

C. Piney River

Penque's recycling process required large amounts of phosphorous. (T-1564, 2914-22). If a cheap source could be found, the process would become extremely valuable. Sandy Williams located a source in Piney River, Virginia. (T-1564, 2914-22).

Penque and Sandy Williams obtained an option on mining property in Piney River. (T-1564-65, 1823-25; G.Ex. 45, G.Ex. 40). In 1975-76, Sandy Williams sought financing to purchase the property. He was introduced to the Stone Foundation ("Stone") by Ernest Garrett and after some discussion, Stone agreed

to finance the mine. (T-1568). Title to the property was taken by the newly-formed United States Titanium Corporation, ("USTC:) which was owned as follows: Penque Williams, Inc, 56 2/3%; Garrett, 33 1/3%; and Alan Torriello, 10%. (T-1568). At the closing for the purchase of Piney River, USTC received $600,000.00 from Stone. In turn, USTC gave Stone a mortgage of $1,200,000.00 on Piney River. Financing the debt became an immediate problem. After one mortgage payment, USTC went into default. (T-1573, 1577-78).

Sometime prior to the default, Sandy Williams, believing he had a malignancy, prepared a document which stated, in essence, that one-half of everything he owned belonged to Senator Williams. However, Sandy Williams never signed these documents (G.Ex. 48; T-1571, 1574-75). The documents were given to Senator Williams who considered it a nice gesture but attached no particular value or substance to it (T-4193-96).

In 1977, Sandy Williams discussed financing Piney River with his old friend, George Katz. They obtained options on the property adjacent to that owned by USTC. (T-1580, G.Ex. 44)[2/].

[2/] Mr. Feinberg was only vaguely aware of this transaction and, as with all his information concerning the mine's potential, he received his only information from Sandy Williams.

Concommitant with the option transaction was a planned reorganization of USTC which would allow for Garrett, Torriello, Katz and Sandy Williams to share in the reorganized corporation. According to Sandy Williams, the Senator was to share in Sandy's interests based on the above-described documents. (T-1580-81). The proposed reorganization never took place and the need for financing remained a constant and separate problem. (T-1581, 1924-25).

After the USTC default, Sandy Williams, who was seeking loans, prevailed upon the Senator to introduce him to certain financial institutions. Sandy Williams testified that the Senator had exerted no undue pressure on either of the two institutions to whom he was introduced. (T-1740-41). Furthermore, at no time during the course of these negotiations did Sandy Williams indicate that the Senator had an interest in the venture. (T-1742). All efforts to obtain financing with these and other institutions were unsuccessful. (T-1787-88, 1803-0

All reports obtained by Sandy Williams indicated that Piney River was a valuable property only awaiting sufficient funds to commence viable economic operations. (T-2003, 2007, 2042). In 1979, the need to obtain this financing to salvage the mining venture became desperate. (T-1896). Both Senator Williams and Mr. Feinberg believed, and continued to believe, that the project had merit.[3/]

D. The F.B.I. Piney River Scam

Early in January 1979, Senator Williams, attending a political function in Camden, New Jersey, (T-4227-28), had a short social conversation with Angelo Errichetti, Mayor of Camden. Mayor Errichetti mentioned that he had been in contact with certain financial advisors who appeared to have substantial amounts of investment capital. (T-4232-33).

3/ To date, the F.B.I. has never sent anyone to ascertain whether the mine was a legitimate and viable mining venture. The initial agent in charge had no information as to the extent of the ore deposits or their economic potential. He, nor anyone else, made any attempt to confirm that the integrated Piney River American Cyanamid purchase was a viable entity, explaining that this was not his job. (T-692-93, 699, 1141-43).

Senator Williams indicated he had some friends seeking funding and asked Errichetti if Mr. Feinberg could call him. (T-4233). Thereafter, Mr. Feinberg arranged a meeting with Errichetti. (T-1582, 4235). Thus, the F.B.I. entered Mr. Feinberg's life.

At the meeting were Special Agent John McCarthy, posing as Jack McCloud the Chairman of Abdul Enterprises,[4] F.B.I. informant Mel Weinberg, Errichetti, Mr. Feinberg and Sandy Williams. (T-1583, 3562-63). Sandy Williams dominated the meeting, describing Piney River and its financing need. Sandy Williams indicated that titanium extracted from the mine was to be used to manufacture paint. (T-617). In response to Weinberg's query, Sandy Williams indicated that the owners of the mine were Garrett, Katz, Torriello, Sandy Williams and Mr. Feinberg. At some point in the conversation, it was mentioned that the Senator was interested in the venture. (T-1242, 1583-84). At the conclusion of the meeting, Sandy Williams agreed to provide to Weinberg data concerning the mine. (T-1585; G.Ex. 46). In addition, the Arabs were to commission an engineer to evaluate it. Sandy Williams indicated that the project would require ten to thirteen million dollars. Weinberg immediately indicated that if the venture appeared viable, the Arabs would be willing to provide the full thirteen million. (T-1585; G.Ex. 46)[5].

---

[4] The corporate front for the Arab investment capital was Abdul Enterprises. The background to its establishment and the manner in which the F.B.I. manipulated its operation is thoroughly familiar to this Court as a result of previous petitions for certiorari by defendants involved in the Abscam probe.

[5] The amount of energy invested by the F.B.I./Strike Force team in attempting to "make a case" against its defendants was astounding. Weinberg once remarked that, "Once you get a sucker on the line, you got to keep calling him day and night and never let him off." (T-1366). Weinberg and the F.B.I. met or spoke with the targets herein eleven (11) times, in March 1979. By May, the frequency had increased to twenty-seven (27) visits or calls by Weinberg. In June and July, Weinberg engaged in twenty (20) meetings and calls. There were, incredibly, forty-one (41) such incidents in August. September saw forty-seven (47) calls and meetings by Weinberg. In November and December there were thirty-seven (37). (F.Ex. X). Weinberg and the F.B.I. apparently subscribe to the old adage, that if at first you don't succeed, try, try again.

Soon after this meeting, Errichetti called Mr. Feinberg and indicated that the "Arabs" were interested in purchasing Garden State Raceway. At Errichetti's request (T-3563-66), Errichetti, Weinberg and Special Agent Anthony Amoroso, acting as Tony Devito, the new president of Abdul Enterprises, met to discuss the proposal. (T-3556-57). The conversation started with "John McCloud's" status as an old-time Boston politician who had a "certain way" of doing things, the implication being that bribes had to be used in any business transaction. (T-3567). Mr. Feinberg immediately declared that he did not do business that way. (T-3567). He further stated that the easiest way to purchase the race track was to proceed legitimately. (T-3572, 3576-77). Weinberg tried again to get Mr. Feinberg to inculpate himself, indicating that the Senator was an indispensible party for the financing. (T-3567). Mr. Feinberg stated that the Senator had nothing to do with the matter. (T-3572).

This was the first of innumerable conversations initiated by Weinberg urging concealment of Senator Williams' interest in Piney River. Day after day, month after month, Weinberg repeated this theme. After the Biocel disaster, Mr. Feinberg and the Senator were extremely reluctant to prematurely disclose the Senator's interest in Piney River. (T-3568-73, 3583). They had learned that however innocent and legitimate their efforts, such efforts could result in unwarranted accusations and public embarrassment, which could needlessly damage the Senator's career. (T-3568-69, 3583).

Originally, Mr. Feinberg was unsure of the law governing the Senator's duty to disclose (G.Ex. 7A, pp. 1-3). He eventually sought expert advise from tax counsel with regard to Piney River. Expert counsel confirmed Mr. Feinberg's preliminary opinion that at this point it was unnecessary to disclose the Senator's interest in Piney River, since it was nebulous and without economic value. (T-3606-07). Senator Williams and Mr. Feinberg persistently reiterated that if the project were ever incorporated, and funded, thereby providing the Senator with something of financial value, he would promptly disclose his holdings. Throughout Senator Williams and Mr. Feinberg believed that no prior disclosure was legally required. (T03627-29, 3779; F.Ex. C).

In March 1979, Sandy Williams informed McCarthy that the American Cyanamid plant in Savannah was for sale and that coupling this plant with Piney River could have great profit potential. (T-1587). It would require an additional one hundred million to finance both projects. (T-1587). The Arabs immediately agreed to look into the possibilities. Neither Senator Williams nor Mr. Feinberg were aware of this exchange at the time.

Shortly thereafter, Weinberg requested that Mr. Feinberg and Sandy Williams bring the Senator to a party in Florida to meet "Sheik" Yassir Habib, the purported key involved in the financing of the mine. (T-1243-44, 3577). The Senator and Mr. Feinberg paid their own airfare. (T-3585)[6/].

6/ Subsequently on April 13th upon learning that Senator Williams was going on vacation, Weinberg urged Mr. Feinberg to convince the Senator to use Abdul's corporate jet for the trip. After conferring with the Senator, Mr. Feinberg informed Weinberg that the Senate Rules precluded acceptance of the offer. (F.Ex. K).

At the party, in response to a specific question from Weinberg, Mr. Feinberg stated that, although the Senator had no financial interest in the mine, he would endorse the project privately. (G.Ex. 2A, pp. 18-20). This statement, of course, was based upon Mr. Feinberg's belief that the Senator owned nothing until the project was formalized and funded. (T-3569, 3584). Mr. Feinberg stressed at the party that the project must be handled in a legitimate manner. (G.Ex. 2A, p. 21).

At a meeting subsequent to the party, not attended by either the Senator or Mr. Feinberg, Sandy Williams discussed an additional seventy million needed to purchase the Cyanamid Savannah plant. Weinberg promptly and generously agreed to the seventy million increase, on the condition that he and DeVito share a ten percent interest in the venture and that it be a straight loan. (G.Ex.4A, p. 8).

Sandy Williams recalled that in May 1979, he had read various articles about the military value of titanium, (T-1583, 5196). In a discussion with Katz concerning Government contracts, Sandy Williams expressed his belief that influence could not be used because Government contracts were selected by bids, (T-1597).[1/] In late May 1979, Katz conveyed the information on titanium to Weinberg. (G.Ex 5A)

While Piney River had appeared viable to all involved before the idea of government contracts was ever raised, once Weinberg learned of this possibility, he employed it time and time again to attempt to coerce Mr. Feinberg and the Senator into inculpating themselves by agreeing to conceal the Senator's interest in Piney River. Now, according to Weinberg, there would be no project

---

1/ At trial, Harold C. Petrowitz, an expert in government contracts, established there was little or no way a member of Congress could influence government contracts, whether purchased under the Stock Pile Act or other governmentprocurement regulation. (T-2778, 2849). Mr. Feinberg also testified that to his knowledg, government contracts could only be obtained by sealed bid. (T-3599).

without government contracts and no Arab money without the Senator agreeing to use his influence to procure the contracts. Further, according to Weinberg, the Senator could not use his influence to obtain the contracts if his interest were disclosed.

Weinberg began calling Mr. Feinberg, and asking whether he had seen the articles about titanium - Mr. Feinberg had not. (G.Ex. 6A, p. 1). Weinberg then raised, for the first time, the idea of procurring government contracts. (G.Ex. 6A, p. 1)[8/]. Mr. Feinberg was beginning to feel intense pressure from Weinberg to adopt the "Arab way". He attempted to pacify Weinberg by indicating that the Senator would "make introductions". Mr. Feinberg hoped that if Weinberg were placated, the financing would become available. In reality, he thought that the Senator would do what any Senator legitimately could do - make introductions. (T-3599-3600). In Mr. Feinberg's mind, no improper activity would be necessary since Piney River would sell itself on its merits.

During this same period Weinberg and Mr. Feinberg discussed creating various corporations to acquire Piney River and the options to adjacent properties. Weinberg arranged a luncheon at the Hotel Pierre purportedly to discuss the corporate structure. (T-3592). He used this occasion to pressure Mr. Feinberg and the Senator, hoping to get useful inculpatory admissions. Just before the luncheon, Mr. Feinberg was approached in the hotel men's room by Weinberg and Amoroso. They urged him to persuade the Senator to use his influence to get government contracts. (G.Ex. 7A-1). Mr. Feinberg stated that it should

---

8/ This is only one of the many instances where Weinberg directed the scenario with uncanny skill not apparent until later. (T-3585, 3720, 3766). For example, Weinberg was obsessed with Senator Williams' being in on meetings and "protecting the Senator". (T-3766-77).

be understood that the Senator could not obtain contracts but could only "open up the doors" — he contemplated the Senator making a legitimate call or an introduction. (T-3602). Weinberg persisted in his attempts. Mr. Feinberg responded by stating that the Senator would not guarantee contracts, would not perjure himself regarding the disclosure of any meaningful interest that he might acquire in the mine, and would disclose such an interest when it became viable. (T-3601-04, 4279-80, F.Ex. M).

Weinberg, Amoroso and Feinberg joined the Senator and Sandy Williams in the dining room. Enroute, Weinberg and Amoroso tried again, pressing Mr. Feinberg about the Senator's ability to obtain government contracts, especially if the Senator were to have an interest in Piney River. Mr. Feinberg repeated that the Senator could "open doors" (G.Ex. 7A-2, pp. 1-3), but made clear that any decision regarding the disclosure of the Senator's interests in the venture had to wait until he reviewed the law on collateral investments for a United States Senator. (T-3604-06).

In the luncheon meeting, Senator Williams unequivocally stated that he would disclose any interest that he had in the proposed corporation, once the venture became viable. (G.Ex. 7A-3; p. 2; T-3611, 4279). Mr. Feinberg testified that his statement during the conversation, that he would take care of the disclosure issue, was meant only to appease the Arabs. (T-3608-09)[9/]. The meeting concluded with a vague agreement that new corporations should be established and that the Arabs would buy out Torriello and Garrett. (T-816-17, 3613-14).

That evening Weinberg tried again by telephone. He insisted that Mr. Feinberg provide him with another name in which to place the Senator's stock.

9/ Mr. Feinberg's testimony as to his state of mind at this time and during the course of the Weinberg/F.B.I. scenarios is most interesting: "Well as far as I was concerned, again, was going — I constantly was under pressure from these people about this subject matter. I was trying to placate them because I wanted this thing to succeed. I believed in it. I believed in them and when you believe in — you want to believe and I did." (T-3608-09, 3642-43).

Feinberg put him off. (G.Ex. 8A, pp. 1-2). Mr. Feinberg later informed Weinberg that the Senator wished to have his shares placed in his own name and interest disclosed. (F.Ex. O, p.2).

Weinberg continued to demand that no shares be issued in Senator Williams' name. (T-3618-19),and in fact, made financing of the venture expressly contingent on this condition.

On cross-examination, Weinberg confirmed that, in his opinion, Mr. Feinberg did not have the power and guts to do what he and Amoroso asked of him. (T-1370). Thus, it is evident by Weinberg's own testimony that although he was finally able to coerce Mr. Feinberg into saying things to appease him, even Weinberg realized that Mr. Feinberg would not follow through with an improper act. More coercion was applied.

Weinberg next requested that Mr. Feinberg prepare resumes of all interested parties for the Sheik. He insisted that the Senator's resume include a statement that the Senator would guarantee government contracts. (T-3626). Mr. Feinberg never prepared such a resume and was severely reprimanded by Amoroso for not doing as the Arabs wished. (G.Ex. 10A, p. 5).

A meeting was called in June by Amoroso allegedly to discuss the new corporations. Prior to this meeting, Weinberg emphasized to Mr. Feinberg that the Senator's guarantee of government contracts was crucial to obtaining financing of theproject from the Arabs. Weinberg and Amoroso were particularly angered when Mr. Feinberg insisted again that the Senator would take the shares in the new corporations in his own name and disclose his interest. (G.Ex. 10A, p.3). Displeasure deepened into anger when Mr. Feinberg presented

them with a memorandum in which the Senator extolled the virtue and integrity of the mining venture. (T-3630). They stated that this was insufficient to satisfy an Arab, who, according to Weinberg, "can't read between the lines". Amoroso took Mr. Feinberg to task in no uncertain terms for his unwillingness to "take care of things" as they wished. (G.Ex. 10A, p. 5, T-3635).

Weinberg and Amoroso then attempted to get the Senator to say what Mr. Feinberg would not write. They arranged a meeting between the Senator and the Sheik. Weinberg emphasized that at the meeting the Senator must "come on strong", and indicate that he would guarantee government contracts. (G.Ex. 10A, p. 7; T-3641). When Errichetti forcefully repeated the demand that the Senator must "come on strong" in order to impress the Sheik, (T-3639-40, 4285), the Senator felt that Errichetti was asking him to do something out of character and stated he would speak to the Sheik in his own way. (T04285).

In response to Weinberg's continuing pressure, Mr. Feinberg attempted to assure him that the Senator would act as they wished. Despite the assurances, Mr. Feinberg testified that the Senator did not intend to guarantee contracts or do any more than make telephone calls or introductions. (T-3640-41). Obviously, Weinberg did not believe Feinberg's "assurances" since on that same date, Weinberg again stressed to Katz that even further pressure would have to be placed on the Senator. (F.Ex. G., p. 1).

A few days before the Senator's meeting with the Sheik, Weinberg contacted Mr. Feinberg to once again emphasize that the Senator must "come on strong". (G.Ex. 12A). It was Mr. Feinberg's belief that although the Senator would not

"come on strong", he would convince the Sheik that the project was truly a great one. (T-3642).

On the evening of June 27th, Errichetti and Mr. Feinberg, along with Weinberg and Katz met at the Marriott Inn in Arlington, VA. Weinberg once again insisted that the Senator say that he would guarantee the government contracts. (T-3644-48; G.Ex. 13A, p. 8).

The conversation between Errichetti, Weinberg, and Katz after Mr. Feinberg left for the evening, is indicative of the lengths to which the other parties were going in order to overcome the Senator's and Mr. Feinberg's reluctance to acede to Weinberg's demands:

> AE: I got Pet [Senator Williams] by the fucking throat, I tell you about as close as I cam in his office. Let me tell you something, cock-sucker, don't you go fucking this thing up. I got a chance to make a fucking million dollars, you prick. All you're gonna do is give a fucking speech like you never gave in your life and there's not much left to say. You're gonna fucking guarantee that fucking contract. (Inaudible) I said you're gonna fucking say it. I don't give a fuck. Never mind about doing it. You're gonna fucking say it.
>
> (F.Ex. H) [Emphasis added]

On June 28th, Mr. Feinberg met briefly with the Senator before Weinberg and Amoroso quickly ushered the Senator off to meet the Sheik. Unbeknownst to Mr. Feinberg, the Senator had been given a lengthy coaching session by Weinberg on what he should say and do. (G.Ex. 14A). Senator Williams was instructed by Weinberg to stress his position in the Senate, his prominence, and the fact that he could do favors. The Senator was informed that it was imperative he tell

the Sheik that he could exert influence to get the contracts, even though the speech was all "bullshit". As Weinberg put it, the Senator was to be "on stage for twenty minutes". Weinberg cynically characterized him as "the most expensive TV star that ever got paid". He urged the Senator to "throw names, be a star, it was 'the Arab way'." Mel even wore a tie for the occasion. (T-4305, 4328).

By his own admission, in his meeting with the Sheik, the Senator foolishly bragged about his position in the Senate, his relationship to other members of Congress, and his ability to get things done. (T-4360). Although the Senator knew virtually nothing about titanium, he attempted to impress the Sheik with the importance of the metal. (G.Ex. 15A). At trial, he characterized much of what transpired in this meeting as "baloney". (T-4369-71, 4378). However, when Amoroso suggested that the Senator's interest in the mine be concealed, the Senator responded by firmly emphasizing the position he had taken at the Hotel Pierre - based upon Mr. Feinberg's advise, he intended to declare his interest as soon as the project obtained financing and became meaningful. (T-4351).

Subsequently, it was agreed that Mr. Feinberg would establish certain corporations for the purpose of acquiring the Savannah and Piney River properties. Mr. Feinberg would prepare the necessary papers for the stockholder's meeting including the requisite stock certificates. No stockholder agreement was ever prepared. (F.Ex. T; T-3652). While insisting to Weinberg that all corporate formalities must be observed, he did agree to Weingerg's demand that the Senator's certificates be in blank, for the time being. (G.Ex. 17A, pp. 2-3)

Prior to the stockholders' meeting, and without Mr. Feinberg's knowledge, Weinberg offered Sandy Williams $20,000.00 expense monies to be paid to the Senator. The Senator refused. (G.Ex. 18A, p.2).

On July 11th, a lengthy stockholders' meeting was held at JFK airport. Present were Mr. Feinberg, Erricheti, Weinberg, Amoroso, Katz, William Evoy, and Sandy Williams. Three corporations were created. Cross-examination of Amoroso and Weinberg confirmed that all issued stock was worthless. (T-1168-69, 1363-64, 3569, 3567, 3664-65). Mr. Feinberg held the Senator's worthless shares in trust for him. (T-3659). At Weinberg's and Amoroso's request the stock certificates were conveyed to them, allegedly to be shown to the Sheik. (T-3659). The stock certificates at JFK Airport on August 5th, prior to a departure for Europe. (G.Ex. 21A, p.4).

E. The F.B.I. Resale

Having been unable to coerce or bribe Mr. Feinberg or the Senator into committing an incriminating act, in August 1979, the F.B.I. upped the ante with yet another scam. This time, a pretended sale of the mine to a second group of phony Arabs. (T-1170). Weinberg began this scam by informing Mr. Feinberg and Katz that a separtate group of Arabs was interested in purchasing the mine at a profit of some seventy million dollars. The profit would be realized at simutaneous closings. (T-1635, 3666-68). Weinberg and Amoroso arranged a meeting on September 11, 1979, with Erricheti, Katz, Mr. Feinberg, Sandy Williams and the Senator. (G.Ex. 23A; T-3669). At this meeting, Weinberg and Amoroso skillfully launched the resale scenario emphasizing that the resale would net the parties seventy million dollars. (G.Ex. 23A, p.18; T-3670). Fearful that seventy million dollars wouldn't be enough, Weinberg also suggested a tax evasion scheme. However, his Swiss bank scheme was flatly rejected. (G.Ex. 29A, pp.60-65; T3674-75).

Weinberg insisted that if the resale was successful, the Senator must stay with the new entity in the same capacity as the persent venture. (G.Ex. 23A, p.29). Weinberg emphasized that the resale depended on the Senator obtaining the government contracts. (G.Ex. 23A, p.29; T-3672, 4453-56). When the meeting dispersed, the corporations had no assets and the stock continued to be worthless. (T-3688). It was decided at the meeting that they would go ahead with the resale.

F. The Ritz Carlton Transaction

In late 1979, the New Jersey Casino Control Commission was considering an application by the Ritz Carlton which would permit the Atlantic City Ritz to be rebuilt rather than razed. (T-3679-81). Senator Willisms' wife, Jeanette, contacted Mr. Feinberg and requested any assistance that Mr. Feinberg could render in support of the Ritz' application. (T-3682).

It was the general policy of the Casino Control Commission to invite comment and input from the public on all pending applications. (T-3681). Because he was personally acquainted with Ken McDonald, the Vice-Chairman of the Commission, Mr. Feinberg chose to meet with him to persent the merits on behalf of the Ritz. (T-3682-83). Mr. Feinberg perfaced his remarks by stating that if he were "out of order" McDonald should let him know. (T-3682). IU a short conversation, Mr. Feinberg presented to McDonald the reasons why the Ritz should be allowed to renovate rather than tear down the existing structure. McDonald indicated he would look into the matter. Mr. Feinberg thanked him and left. The Ritz Carlton's application to renovate was ultimately approved. (T-3684-85).

Subsequently, Mr. Feinberg was appointed counsel for the Ritz in New Jersey. (T-3686). In his capacity as general counsel for the Ritz, Mr. Feinberg became aware of the difficulties encountered by the Ritz in obtaining financing for the Casino. The Ritz was in need of some seventy million dollars.

Since Senator Williams was a personal friend of the Chairman of the Board of the Hardwick Corporation, which owned the Ritz Carlton, and the Senator's wife was a paid consultant to Hardwick in 1979, the Senator also was aware that the Ritz was seeking financing. (T-4487-94, 4497-99). At Mr. Feinberg's request he attended the meeting with Weinberg and Amoroso during which Mr. Feinberg presented documents in support of the Ritz' application for a loan. (T-4500). In the course of discussion, Mr. Feinberg stated that he believed there would be no problem in obtaining a gaming license for the casino. At trail, he testified that this opinion was based on his knowledge that the principals were of high repute. (T-3696-97). He then attempted to impress Amoroso and Weinberg by enaggerating the influence he had had on the grant of the Ritz' application to renovate. (G.Ex. 24A. pp.9, 11-12, 17-18).

Weinberg's own assessment that the principals owned nothing of value at that time was one of the few true statements ever made by him. (G.Ex. 23A, pp. 58-59; T-2673). Joseph Fusco testified that he was the staff member responsible for making recommendations as to the Ritz Carlton applications. He testified that he handled the Ritz application personally and that the Commission adopted his recommendations. (T-3241, 3245). He did not know the Senator at the time of the granting of the Ritz application. He stated that neither the Senator, Jeanette Williams. nor Mr. Feinberg had any influence on the granting of the permit. (T-3246-49). Fusco specifically noted that Mr. Feinberg had no dealing with Fusco's office. (T-3248-49). Mr. Fusco further testified that no outside influence was ever attempted to be brought to bear on the Commission and the decision was reached by the staff solely on the merits. (T-3276-82). Mr. Fusco also testified that the permit application submitted by the Ramada, and building had structural difficulties. (T-3231).

Weinberg indicated that any loan provided by the Arabs would be available at an attractive rate of interest of two points above prime. (T-3713-14). Weinberf further indicated that if the Arabs financed the transaction, a finder's fee of three million dollars would be reasonable. (G.Ex. 24A, p.23; T-3697). The Senator testified that this was the first he had heard of a finder's fee. (T-4509).

As in the Piney River transaction, Weinberg insisted that the Senator's interest in this venture must be concealed. The Senator, however, once again, clearly indicated that he intended to disclose his interest. (G.Ex. 24A, p.41; T-4518-20). At this juncture Amoroso and Weinberg raised the subject of Piney River. Again they warned the Senator that his wish to declare his interest in that project would ruin the chances of selling the property to the second group of Arabs. (G.Ex. 24A, p.44). It was agreed that Weinberg and Amoroso would look into the possiblity of financing the Ritz, but the F.B.I. abandoned this scenario. (T-3741).

G. The F.B.I. Asylum Scam

In early January, Weinberg called Mr. Feinberg to request a personal favor for Sheik Yassir. Shortly thereafter for the purpose of ascertaining what the "favor" was, Mr. Feinberg and Katz met with Amoroso and Weinberg at the Plaza. (T-3717). During the conversation it was revealed that the Sheik was seeking permanent residency in the United States. Amoroso suggested that a private immigration bill could be introduced by the Senator. (T-3719). Mr. Feinberg knew nothing about private immigration bills. He told Weinberg and Amoroso that before any action could betaken, the Senator would need a complete background of the individual requesting assistance. (T-3719). Amoroso assured him that there was nothing in the Sheik's background that would prohibit entry into this country. (T-3719). Mr. Feinberg agreed to contact the Senator and did so.

On January 19, 1980, Mr. Feinberg informed Amoroso that the Senator would meet with the Sheik the next day. (T-3721). Mr. Feinberg insisted again that the matter had to be handled legitimately. (F.Ex. V; T-3721).

The Senator attended the meeting accompained by Sandy Williams, Katz and Mr. Feinberg. After a short introduction, the Senator was left alone with Amoroso and Special Agent Farhardt, posing as the Sheik. They offered the Senator money. The Senator flatly rejected the offer without hesitation. (G.Ex. 24A). Sentor Williams indicated that he would assist the Sheik only if the Sheik's claim of hardship was verified by his staff. The meeting concluded with Amoroso agreeing to supply the request information.

H. The Joe Silvestri Conversation

On February 21, 1980, F.B.I. Agents visited and interviewed Mr. Feinberg at his home. (T-3726, 3804). After being advised of his rights, Mr. Feinberg expressed his desire to cooperate fully with them. (T-3801). A far ranging involvement with the Ritz Carlton Casino and the Piney River projects. (T-3730, 3797-99, 3801). Mr. Feinberg chronicled his relationship with the Arabs from the date of their first meeting. Mr. Feinberg assured the agents that the Senator had intended to disclose his interests in the projects and he had never intended to use his position to obtain government contracts. (T-3734). He insisted that neither he nor the Senator had done anything wrong. (T-3801-02)

In the course of the interview, Mr. Feinberg also discussed his relationship with Joseph Silvestri, a housing contractor. Silvestri had been interested in obtaining financing for the Dunes Casino. (T-3727).

Sometime later, Mr. Feinberg called Joe Silvestri. That evening, Silvestri returned the call while seated in Mr. Puccio's office. Unbeknownst to Mr. Feinberg, Silvestri had been instructed by the Justic Department to lie about his whereabouts and the attempt to induce Mr. Feinberg to lie or incriminate himself. (T-3737-38). The specific effort was directed toward asking Mr. Feinberg what Mr. Feinberg would wish Silvestri to say to the F.B.I., if he, Silvestri, were questioned by them. (T-3740). Mr. Feinberg initially informed Silvestri that the Arabs were actually Government Agents. He further stated that during his interview with the F.B.I., he had discussed Silvestri's role in the Dunes financing project. (F.Ex. W, pp.2-5). Silvestri, then asked what he should do if contacted by the F.B.I. Feinberg replied, "Just tell'em the truth".

REASONS FOR GRANTING THE WRIT

POINT I

THE METHODS EMPLOYED BY GOVERNMENT AGENTS IN THE COURSE OF THEIR INVOLVEMENT WITH PETITIONER WERE OUTRAGEOUS AND OVERREACHING, CONSTITUTING A VIOLATION OF PETITIONER'S DUE PROCESS RIGHTS

Since it first enunciated the entrapment defense in Sorrells v. United States, 287 U.S. 435 (1932), the Supreme Court has been divided on the factors which should be considered in establishing such a defense. In Sorrells, the Court held that a finding that the Government had induced the defendant to commit a crime was not, in itself, sufficient to sustain the entrapment defense. In addition to the inducement, the defendant must not have been predisposed to commit the crime charged.

Recognizing that this construction of the entrapment defense would afford the Government too much latitude, the Court enlarged the potential scope of the defense in United States v. Russell, 411 U.S. 423 (1973). There the Court warned that, even when a defendant was predisposed to commit the offense, a situation could exist in which "....the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the Government from invoking judicial processes to obtain a conviction." Id at 431-432.[10/]

In the subsequent decision of Hampton v. United States, 425 U.S. 484 (1976), the Court rejected a defendant's assertion of a due process defense based on government misconduct. A plurality of the Court concluded that the defense of entrapment was the sole remedy available to a criminal defendant. However, just as significantly, the concurring

---

10/ Following Russell, several Circuits invoked due process principles as a basis for overturning narcotics convictions where government agents had supplied the contraband to the defendants. United States v. West, 511 F.2d 1083 (3rd Cir. 1975); United States v. Mosley, 496 F.2d 1012, aff'd on rehearing 505 F.2d 1251 (5th Cir. 1974).

and dissenting Justices, constituting a majority, held that due process was still a viable defense where there has been government misconduct. Justice Powell, in his concurrence, affirmed that "there is certainly a constitutional limit to allowing Government involvement in crime", 425 U.S. at 493, n. 4 (quoting United States v. Archer, 486 F.2d 670 (2d Cir. 1973).[11]

Although reaching its decision on other grounds, the Second Circuit in Archer had issued a stern warning regarding future misconduct by agents of the government. Judge Friendly clearly indicated that government agents who "displayed an arrogant disregard for the sanctity of the state judicial and police process did indeed, violate the principles of due process." Id at 677. Furthermore, the availability of a due process defense, when the government involvement in criminal activities has reached the level of outrageousness, has been recognized by the Third, Ninth, Fifth, and Eighth Circuits. United States v. Twigg, 588 F.2d 373 (3d Cir. 1978); United States v. Prairie, 572 F.2d 1819 (9th Cir. 1976); United States v. Graves, 556 F.2d 1319 (5th Cir. 1977); United States v. Quinn, 543 F.2d 640 (8th Cir. 1976).

Among the relevant factors to be considered when a defendant has raised the due process defense are (1) the defendant's prior lack of criminal involvement;[12] (2) the extent of the government's involvement in criminal activities; and (3) the persistence of the government in its attempts to entrap the defendant. United States v. Twigg, supra; United States v. Graves, supra at 1319; United States v. Batres-Santolino, 521 F.Supp. 744 (N.D. Cal. 1980).

11/ In the view of the concurring Justices, however, the particular acts by the government in Hampton did not violate due process, 425 U.S. at 495.

12/ Notably, most of the cases rejecting an outrageous government conduct defense involved defendants who had previously been involved in similar crimes or ongoing criminal enterprise. See, United States v. Russell, 411 U.S. 423 (1973); United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980), cert denied 101 S.Ct. 863 (1981).

A. The Size of the Inducement

In its efforts to lure Petitioner into criminal activities the Government created an escalating series of inducements which offered Petitioner wealth beyond his wildest dreams. Initially, Abdul Enterprises was to provide a $13,000,000.00 loan which would have rendered the Piney River mine operable. Shortly thereafter, Weinberg indicated that the Arabs might also be interested in providing additional financing of some seventy million for the purchase of the Cyanamid property. Seventy million was also offered for the Ritz Casino financing.

Just in case a loan of $100,000,000.00 was not enough to convince Petitioner to do things "the Arab way", the Government created the resale scam. The resale which was, of course, contingent on the Senator's non-disclosure and procurement of Government contracts would net the principals a profit of seventy million dollars. All of the sums offered were mind boggling beyond anyone's wildest dreams.

Yet another offer of financing was made for the Ritz Carlton renovation project. Weinberg expressed the willingness of the Arabs to provide another loan for $70,000,000.00 at two points above the prime interest rate. Mr. Feinberg would earn a finder's fee of three million dollars if the financing materialized.

The incredible amount of these inducements cannot be considered the same kind of ordinary temptation that Assistant Attorney General Hyman found to be just "floating out there". [Meyers D.P. Ex. 1W (cited in United States v. Kelly, Slip. Op. No. Cr. 80-00340, n.47 (D.C. May 13, 1982)]. Defense counsel attempted to have the size of the inducement

considered by the jury. However, the trial court rejected this request to charge. (Feinberg's Request to Charge: Ct. Ex. 15, Request No. 1). Significantly, the extent of the inducements offered were not monitored by anyone in the F.B.I. or the Justice Department. It would appear that Mel Weinberg was free to offer whatever the traffic would bear.

B. The Instigation and Persistence of the Government

In striking contrast to the defendants in Sorrells, Sherman, Russell and Hampton, Petitioner was not engaged in an ongoing course of criminal conduct. Petitioner was merely seeking financing for a mining venture from which he hoped to make a legitimate profit. It was the Government agents who, at every turn, insisted that the desired financing be contingent upon the commission of the crimes charged.

The shareholders in the mine had originally contemplated selling the titanium to paint manufacturers. Once Weinberg learned of the military uses for titanium, he injected the issue of government contracts into the transaction.

The night before the Hotel Pierre luncheon, and just as the long-awaited financing was on the verge of becoming a reality, Weinberg raised the issue of government contracts. He did not merely suggest that it would be advantageous for the Senator to attempt to procure government contracts; he insisted on it. Time and time again, Weinberg stressed that the success of the financing was wholly contingent on the Senator's promise that he would procure these contracts.

Mr. Feinberg made it clear from the start that the Senator would not-could not - procure government contracts. However, to appease the Arabs and preserve the chances for financing, Petitioner indicated that the

Senator would "make introductions" to assist in the mining venture. He never promised to procure government contracts. Petitioner adhered to this position throughout a lengthy period, despite ceaseless pressure in the context of mind boggling inducements by the Government to make such a guarantee.

On the issue of disclosure, it was Weinberg and the F.B.I. again, that insisted on the concealment of the Senator's interest. Petitioner, Feinberg, despite the manipulation of Weinberg, and the F.B.I. postponed on the disclosure issue until he had had an opportunity to consult with a tax attorney and examine the Senate Rules on Disclosure. After careful consideration, Mr. Feinberg and the Senator determined that the law did not demand disclosure of the Senator's interest until such time as the shares attained some monetary value. Petitioner consistently stated that at that time the Senator intended to declare his interest and pay taxes on any profits.

As Petitioner was being continually manipulated with demands that he commit these crimes the rewards for doing so sky-rocketed higher and higher. The original loan for thirteen million dollars ultimately mushroomed to $170,000,000.00. The attainment of financing for the Ritz would have personally netted Petitioner an additional $3,000,000.00. Dispersed among these major inducements were more mind tests, designed by the Government. The Senator was offered the use of Abdul Enterprises corporate jet, $20,000.00 in expense monies and an unspecified bribe for obtaining residency for the Sheik. All of these offers were flatly rejected. Weinberg also suggested that the purported resale of the mine be transacted overseas, in order to avoid taxation on the profits. All principals in the venture, including Petitioner, rejected this scheme without hesitation.

Time and again Petitioner was tested; time and agin he refused to commit any crime. As the Court stated in Williamson v. United States, 311 F.2d 411, 445 (5th Cir. 1962): "There comes a time when enough is more than enough - it is just too much." These sentiments were echoed by Judge Bryant in his decision setting aside the conviction of Abscam defendant John Kelly:

> "A suspicion - free subject should be exempted from further testing on the basis of winning the first battle against temptation. He should not be required to win a prolonged war of attrition against chicanery...If the Government had no knowledge of Kelly doing anything wrong up to his rejection of illicit money, its continuing role as the third man in a fight between his conscience and temptation rises above the level of offensiveness to that of being outrageous."
>
> United States v. Kelly, (Slip Op. See, United States v. Klosterman, 248 F.2d 191 (3rd Cir. 1957).

The Second Circuit has long recognized the significance of persistent effort on the part of the Government.

> "The degree of pressure is properly considered under the element of propensity, as it has direct bearing on the accused's willingness to respond to the inducement of the agent."
>
> United States v. Viviano, supra at 299 n.2.

In the opinion below, the Second Circuit noted that the size of the inducement in this case distinguished it from other Abscam convictions. Nevertheless, the Court held that:

> "We doubt that the size of an inducement can ever be considered unconstitutional when offered to a person with the experience and sophistication of a United States Senator."
>
> (Appendix A, p. 36)

To an attorney with a general practice in southern New Jersey, however, the amount of money being offered by government agents represented greater wealth than he ever imagined he could attain.

More importantly, Mr. Feinberg initially anticipated realizing these tremendous profits through a totally legitimate business venture. The government first raised his hopes of making enormous sums of money and — when his hopes and dreams had been aroused — made the success of that venture wholly contingent on the commission of an illegal act. In so doing, the government administered the ultimate "Morality Test" to ascertain just how great a temptation would cause a law-abiding citizen succumb.

The conduct of government agents in arousing the anticipation of profits from a legitimate venture, then injecting illegality into the venture, escalating the size of the inducement, and persistently insisting that an illegal act be committed, constitutes outrageous and overreaching behavior which violated Petitioner's right to due process.

POINT II

A DEFENDANT'S PREDISPOSITION CANNOT BE PROVEN BY THE INTRODUCTION OF NON-CRIMINAL ACTS OR BY VIRTUE OF THE DEFENDANT'S RESPONSE TO THE GOVERNMENT'S SUGGESTION OF CRIME, FOLLOWING MONTHS OF ENTICEMENT BY THE GOVERNMENT.

Once the defense of entrapment had been raised, it was incumbent upon the Government to prove, beyond a reasonable doubt, that Alexander Feinberg had been predisposed to commit the crime charged in the indictment. United States v. Swiderski, 539 F.2d 854 (2d Cir. 1976); United States v. Viviano, 437 F.2d 295 (2d Cir.), cert. denied, 402 U.S. 983 (1971). Since the existence of inducement was never in doubt, it was clear from the outset that the Government's success in proving predisposition would determine the outcome of this case. Traditionally, predisposition has been proven through the introduction of prior convictions or arrests, or testimony of government agents who had witnessed the commission of other crimes. However, in the instant case that method was not available to the Government. They were faced with a defendant who was a respected attorney with an exemplary record. The government met this challenge by introducing evidence of numerous legitimate business transactions as "similar acts", allegedly probative of Petitioner's criminal predisposition.

A. The Legitimate Nature of the Similar Acts

By a repeated distortion of the facts, culminating in an inflamatory summation, the Government succeeded in convincing the jury that Petitioner had a long history of involvement in illegal activities and was, therefore, predisposed to commit the crimes charged. In reality, each of the similar acts introduced by the government was a legitimate business transaction.

Proof of this contention, regarding the Ritz Carlton transaction, was provided by the Government itself. At the due process hearings, testimony elicited by defense counsel revealed that at the exact time it was seeking to introduce this transaction as relevant to predisposition, the government had in its files a documents which has become known as DP Ex. 24. This Exhibit was a memorandum in which Assistant United States Attorneys Plaza and Weir concluded that there was no impropriety in Mr. Feinberg speaking with Ken McDonald on behalf of the Ritz Carlton's application for permission to renovate the casino. The memorandum was based on F.B.I. 302's which contained the findings of an independent investigation conducted at the request of the Strike Force.

Regarding Petitioner's involvement in Biocel, the only charges of impropriety were levelled during the course of a political campaign. These allegations were totally unsubstantiated. Both Petitioner and Sandy Williams denied any wrong doing at trial.

Mr. Feinberg's conversation with Joe Silvestri clearly indicated that he was confident nothing illicit had transpired during the search for financing for the Dunes Casino. With regard to the Garden State Raceway, Mr. Feinberg also desired to assist in obtaining financing, but rejected Errichetti's and Weinberg's suggestions that pay-offs be required to ensure the success of the venture.

Mr. Feinberg learned of each of these proejcts in the course of his legal practice in southern New Jersey. His application for permits on the part of the Biocel were within the scope of his duties as corporate counsel. His activities in attempting to locate sources of financing for the Dunes, Ritz Carlton and the Garden State Raceway were those of any businessman and there was nothing illegal or improper in any of Petitioner's actions.

Nevertheless, the government through unfounded assertions and innuendo, presented these ventures as examples of Petitioner's prior criminal conduct.

B. The Similar Acts Evidence Was Inadmissible To Prove Petitioner's Predisposition

The United States Supreme Court has long held that when the defense of entrapment has been raised:

> "The accused will be subjected to an appropriate and searching inquiry into his own conduct and predisposition."
>
> Sherman v. United States, 356 U.S. 369, 373 (1958).

The introduction of similar acts evidence has been almost universally considered permissible for the purpose of rebutting an entrapment defense.[13/]

The only states which do not permit similar acts evidence to be admitted on the issue of predisposition in an entrapment case are California and Iowa. See, People v. Rodriquez, 243 Cal. App. 522 (1966); People v. Mullen, 216 N.W.2d 375 (1974).

It is not necessary that the prior crimes, relevant to predisposition, be the same as the crime charged. However, the prior conduct must be "morally indistinguishable" from the crime charged and "of the same kind". United States v. Viviano, 437 F.2d 295, 299 n.3 (2d Cir. 1970), cert. denied, 402 U.S. 983 (1971); United States v. Sherman, 200 F.2d 880, 882 (2d Cir. 1952); United States v. Becker, 62 F.2d 1007, 1009 (2d Cir. 1938).

13/ The Circuits are uniform in their acceptance of this rule. See Whiting v. United States, 296 F.2d 512 (1st Cir. 1961); United States v. Sherman, 240 F.2d 949 (2d Cir.), rev'd on other grounds, 356 U.S. 369 (1958); United States v. Johnson, 371 F.2d 800 (3rd Cir. 1967); United States v. Simon, 488 F.2d 133 (5th Cir. 1973); United States v. Ambrose, 483 F.2d 742 (6th Cir. 1973); United States v. Stocker, 273 F.2d 754 (7th Cir. cert. denied, 362 U.S. 963 (1960); United States v. Brown, 453 F.2d 101 (8th Cir. 1971), cert. denied, 405 U.S. 978 (1972); Notaro v. United States, 363 F.2d 169 (9th Cir. 1966); United States v. Freeman, 412 F.2d 1181 (10th Cir. 1969); Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962).

Subject to the requirements of Rule 403 FRE, prior convictions for similar offenses have been held admissible. Nutter v. United States, 412 F.2d 178 (9th Cir.) rev'd on other grounds, 356 U.S. 369 (1958); Carlton v. United States, 198 F.2d 795 (9th Cir. 1952). Although the distinction between a felony conviction and misdemeanor conviction may be determinative o the admissibility of similar acts for the purpose of impeachment, this distinction has no significance when such evidence is introduced to prove predisposition.

Furthermore, the defendant need not have been convicted of the prior crime which is admitted to prove predisposition. In such instances, testimony has generally been offered by an undercover government agent who has witnessed the defendant participating in an illegal activity. United States v. Abbadessa, 470 F.2d 1333 (10th Cir. 1972); United States v. Brown, 453 F.2d 101 (8th Cir. 1971). cert. denied, 405 U.S. 978 (1972); United States v. Smith, 283 F.2d 760 (2d Cir.),cert denied 365 U.S. 851 (1960). Occasionally, an informant has testified to having witnessed the defendant commit prior similar crimes. United States v. Simon, 453 F.2d 111 (8th Cir. 1971). In some cases, the defendant's own out-of-court admissions of having committed prior crimes have been admitted on the issue of predisposition. United States v. Demetre, 464 F.2d 1105 (8th Cir. 1972); Dege v. United States, 308 F.2d 534 (9th Cir. 1962); United States v. Stocker, 273 F.2d 754 (7th Cir.), cert denied, 362 U.S. 963 (1960).

Some circuits have allowed government agents to testify regarding an informant's disclosure of the defendant's prior criminal conduct. Rocha v. United States, 401 F.2d 529 (5th Cir. 1968), cert. denied 393 U.S. 1103 (1969); Trice v. United States, 211 F.2d 513 (9th Cir.), cert denied 346 U.S. 900 (1954). However, other circuits have excluded such hearsay testimony on the grounds that its questionable probativity as to pre-

disposition was far outweighed by its prejudice to the defendant. Johnston v. United States, 426 F.2d 112 (7th Cir. 1970); Hansford v. United States, 303 F.2d 219 (D.C. Cir. 1962); Whiting v. United States, 296 F.2d 512 (1st Cir. 1961).

It is significant to note that whenever a defendant's prior acts for which he had not been convicted were admitted to prove predisposition, these acts were always clearly criminal in nature. Such evidence has been most commonly admitted when it indicated the defendant's past involvement in drug transactions. United States v. Smith, 283 F.2d 760 (2d Cir.), cert denied, 365 U.S. 851 (1960); United States v. Abbadessa, 470 F.2d 1333 (10th Cir. 1972); United States v. Brown, 453 F.2d 101 (8th Cir. 1971), cert. denied, 425 U.S. 978 (1972); Rocha v. United States, 401 F.2d 529 (5th Cir. 1968), cert. denied, 393 U.S. 1103 (1969); United States v. Cooper, 321 F.2d 456 (6th Cir. 1963); Trice v. United States, 211 F.2d 513 (9th Cir.), cert denied, 346 U.S. 900 (1954).

Testimony regarding a defendant's commission of crimes for which he has not been convicted has also been admitted when the prior acts constituted: (1) bribery, United States v. Viviano, 437 F.2d 295 (2d Cir. 1970), cert. denied, 402 U.S. 983 (1971); (2) illegal manufacture of liquor, Billingsley v. United States, 274 F. 86 (6th Cir.), cert. denied, 257 U.S. 656 (1921); (3) smuggling, Dege v. United States, 308 F.2d 534 (9th Cir. 1962); (4) forgery, United States v. Demetre, 464 F.2d 1105 (8th Cir. 1972); and (5) illegal acquisition of firearms, United States v. Cohen, 489 F.2d 945 (2d Cir. 1973). In each of these instances, the defendant's prior conduct was unequivocally illegal.

In striking contrast, Petitioner's previous attempts to obtain permits for Biocel or the Ritz Carlton and secure financing for Biocel,

the Ritz, the Garden State Raceway and Piney River were legitimate business activities.

Research has failed to uncover any case in any circuit where prior similar acts, which did not clearly constitute a crime, were admitted to prove a defendant's criminal predisposition.

There is no way that Petitioner's behavior can be characterized as a "ready response" to the Government's inducements. At the Hotel Pierre, when the issue was first raised, Petitioner made it clear that the Senator would not guarantee the procurement of government contracts. He adhered to this position over a period of several months despite the insistence of government agents that the proposed financing was contingent on the Senator making this guarantee.

When the issue of disclosure was initially raised by Mel Weinberg, Petitioner, again, resisted his demands. No decision was made until Petitioner had consulted a tax attorney and the Senate Rules on Disclosure. After careful evaluation, Petitioner and the Senator determined that the Senator's interest in the Piney River and subsequent ventures, need not be disclosed until his shares had developed value. However, Petitioner and the Senator consistently stated that he would disclose his interest as soon as the ventures became viable. This position directly contravened the demands of the Arabs.

Petitioner was clearly unwilling to yield to the series of inducements created and orchestrated by the Government. In the face of an overwhelming onslaught of temptations and demands, Mr. Feinberg made consistent efforts to keep all dealings with the Arabs legitimate. Thus, the only alternative which remained open to the Government was to prove Petitioner's predisposition by the introduction of similar acts evidence.

Despite these facts the Second Circuit held the similar act evidence introduced in the instant case to be admissible. The impact of that decision is that when the defense of entrapment is based in the future, predisposition may be proven by prior conduct which is not criminal.

C. The Time When Predisposition is Assessed

The Second Circuit's decision in Petitioner's case impinges upon the entrapment defense in still another way.

During the course of jury deliberation, the following inquiry was made:

> "Does entrapment have to be established from day one of the indictment or can it be established further along in the operation?"

The District Court responded as follows:

> "The inducement question here is a matter of law. It is not a problem you even have to worry about. It is there. The only question that you have to decide in order to answer the element of entrapment is was the defendant predisposed to commit the crime. You said from day one, or at some other time. You have to decide when the crime was committed, if you get to that element, and then determine as of that time when he committed the crime was he predisposed to do it or wasn't he."

The Second Circuit held that the time for assessing predisposition is the time when the criminal opportunity first appears. The Court determined that this time was May 31st, when Petitioner and the Senator were first told that the availability of financing was contingent on guaranteeing government contracts. According to the Court, Petitioner made a ready and willing response at that time.

Although Petitioner would quarrel with this characterization of his

response, for purposes of this Petition attention will be directed only at the Second Circuit's determination of the time at which predisposition should be assessed.

By judging Petitioner's predisposition at the time the demand for a guarantee of contracts was made, the Court discounted the months of time and energy invested by the government in creating an inducement. Initially the government offered financing of thirteen million dollars for a legitimate mining venture. Then additional financing of seventy million dollars was offered for the Cyanamid plant. It was only after the government had succeeded in creating anticipation and hopes for wealth that its agents injected the element of criminality. But a sophisticated scenario, creating a series of tantilizing inducements had been set in motion months earlier.

Predisposition must exist before the period of inducement and persuasion begins. As the First Circuit has correctly noted:

> "Obviously, an entrapped defendant will always be willing and ready to commit the offense after the inducement and immediately before the crimes commission."
>
> United States v. Parisi, 674 F.2d 126, 128 (1st Cir. 1982).

The Second Circuit's decision in Petitioner's case clears the way for the government in the future to go to any lengths in orchestrating inducements to tempt and entrap an unsuspecting citizen - and to do so with impunity.

CONCLUSION

For all of the foregoing reasons, it is respectfully prayed that this Writ of Certiorari be granted.

Respectfully submitted,

HARRY C. BATCHELDER, JR.
CAROL PRENDERGAST
Attorneys for Petitioner
ALEXANDER FEINBERG
90 Broad Street
New York, N.Y. 10004
(212) 344-8880

Dated: New York, N.Y.
July 20, 1983